No. 93-370

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

Supreme Court, U.S.
FILED
AUG 24 1993
OFFICE OF THE CLERK

PASCAL DEBRAINE, ROBERT PETTY, MELVIN DEWITT, GARY GRANGER AND JORDAN QUINTAL

PETITIONERS,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Does the Sixth Amendment right to confront and cross-examine witnesses apply at federal sentencing hearings following the enactment of the United States Sentencing Guidelines where eighty-six percent of federal criminal prosecutions are resolved without trial (the traditional forum for confronting witnesses) and this Court's rationale in Williams v. New York, 337 U.S. 241, decided in 1949 permitting hearsay at sentencing, has no application whatsoever in the contemporary federal criminal context?

a. Prior to addressing the aforementioned question, the Court must consider the threshold issue that it has never directly addressed: Are sentencing proceedings "criminal prosecutions" under the Sixth Amendment?

2. Did the Ninth Circuit err in approving the district court's use of extrinsic evidence to corroborate a presumptively unreliable hearsay statement despite this Court's clear ruling in Idaho v. Wright, 110 S.Ct. 3139 (1990) that evidence extrinsic to the statement may not be so used?

3. Were petitioners' due process rights violated when they were sentenced on the basis of an inherently unreliable hearsay statement, to wit, a statement made by their co-defendant to law enforcement agents during a proffer session where: a) leading questions were permitted; b) the co-defendant planned to testify against petitioners at the time the statement was made; c) the co-defendant was told that nothing he said would be used against him; d) the co-defendant was told that he was facing 30 years in prison; e)the co-

defendant was told that if he minimized his involvement he would be "useless" to the government; f) the government insisted the co-defendant could reme ber things even when he knew he couldn't; and g) the co-defendant cast considerable doubt on the reliability of the original statement when he submitted a second sworn statement detailing the coercive conditions under which the first statement was made?

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UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

The Petitioners[1], Pascal Debraine, Robert Petty, Melvin Dewitt and Jordan Quintal, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

On January 7, 1993, the Court of Appeals filed an opinion, accompanied by a dissent, upholding the district court's judgments of sentence. Petitioners had been convicted of conspiring to distribute

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[1] Joining Pascal Debraine in this petition are his co-defendants who were also sentenced based upon the original sworn statement made by Donald Kessack. Those co-defendants are Robert Petty, Melvin Dewitt, Gary Granger and Jordan Quintal. The terms "Petitioner" or "Petitioners" as used in this Petition shall reference each and every one of these defendants.

in excess of 500 grams of cocaine in violation of Title 21 U.S.C. Section 841(a)(1). A copy of the opinion is attached hereto as Appendix "A". On May 26, 1993, the panel split 2-1 in denying a timely Petition for Rehearing. A copy of the May 26, 1993 Order denying the Petition for Rehearing is attached hereto as Appendix "B".

JURISDICTION

On January 7, 1993, the Court of Appeals entered an Opinion affirming the district court's judgments of sentence following Petitioners' convictions for conspiracy to distribute in excess of 500 grams of cocaine. On May 26, 1993, the Court of Appeals entered an Order denying the Petition for Rehearing. The jurisdiction of the Court is invoked pursuant to Title 28, United States Code, Section 1254(1).

CONSTITUTIONAL PROVISIONS

United States Constitution, amendment V:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; . . .

United States Constitution, amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .

STATEMENT OF THE CASE

On September 28, 1989, the Federal Grand Jury for the Western District of Washington at Seattle returned a Superseding Indictment against the seventeen defendants in this case. The focus of the indictment was the allegations of conspiracy to distribute 500 grams or more of cocaine.

Petitioner Pascal Debraine pleaded not guilty to the charges in the superseding indictment on October 5, 1989. Defendants Petty, Dewitt, Quintal, Granger and Kessack also pled not guilty. On January 8, 1990, petitioners' pre-trial motions were denied. On March 5, 1990, jury trial commenced. On April 4, 1990, the 22nd day of trial, the jury reached a guilty verdict as to all defendants, on all counts, except counts 20, 35, 59, 67, and 68.

On July 27, 1990, petitioner Debraine was sentenced to serve two hundred and eleven (211) months custody, all served concurrently, with respect to each of the counts he was charged with except 64, 79, 66, and 78. With respect to counts 64 and 79 he received the maximum term of five years on each count, and with respect to counts 66 and 78, he received the maximum period of four years on each count.

Petitioner Debraine was also sentenced to five (5) years supervised release to commence at time of release, and the fine was waived by the court.[2]

Petitioners raised several issues in their appeal to the Ninth Circuit Court of Appeals, including the issue of sentencing that is the subject of this Petition. On January 7, 1993, the Ninth Circuit affirmed the District Court's judgments of sentence as to all defendants. On May 26, 1993, the Ninth Circuit denied the Petition for Rehearing.

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2 Petitioner Petty was sentenced to the Bureau of Prisons for a period of 188 months. (SHT 7/27/90, p.191). Petitioner DeWitt was sentenced to the Bureau of Prisons for a period of 188 months. (SHT) 7/27/90, p. 209). Petitioner Quintal was sentenced to the Bureau of Prisons for a period of 211 months. (SHT 7/27/90, p. 191). Petitioner Granger was sentenced to the Bureau of Prisons for a period of 240 months (SHT 7/27/90, p. 217).

STATEMENT OF FACTS

Donald Kessack was the leader of a cocaine distribution conspiracy. Following his arrest, Mr. Kessack began plea negotiations with the government. On October 31, 1989, as part of these negotiations, he proffered a statement under oath to the government ("the Statement"). The purpose of this proffer was to induce the government to agree to a plea bargain. The government was not to use the information against Mr. Kessack in any way other than to impeach him if he later gave testimony inconsistent with the proffer.

Mr. Kessack's proffer session was no different from most other proffer sessions: it was conducted behind closed doors with only the Assistant United States Attorney, investigating agents, Kessack and Kessack's own attorney present. The questioning was

conducted informally. There was no limitation on the form of questions posed to Mr. Kessack. In other words, leading questions were permitted. None of Mr. Kessack's co-defendants' attorneys were present for the proffer. Counsel for Mr. Kessack's co-defendants, therefore, had no opportunity to cross-examine Mr. Kessack to determine his truthfulness or his capacity to remember facts of which he spoke.

Prior to commencement of the proffer session, Mr. Kessack's attorney had advised him he was facing a possible sentence in excess of thirty (30) years. He was further advised that the only way that he could hope for a lesser sentence was to cooperate with the government. With this in mind, Mr. Kessack agreed to speak to the agents regarding the conspiracy in which he was facing charges.

Mr. Kessack's plea negotiations

failed. He went to trial with his co-conspirators, including petitioners. All defendants were convicted on April 4, 1990.

Mr. Kessack was sentenced without the court seeing the Statement. On July 6, 1990, at the subsequent sentencing hearing of the other defendants, the government called Mr. Kessack as a witness for purposes of establishing the drug quantity pursuant to Section 2D1.1 of the Sentencing Guidelines. Mr. Kessack refused to testify on the ground of his privilege against self-incrimination. The district court entered an order compelling him to testify. Mr. Kessack still refused to testify.

The government then asked the court to unseal and review the Statement. Defense counsel objected strenuously, noting that the circumstances in which the proffer was made make the content of the proffer inherently unreliable. Attorney Marshall,

counsel for Jordan Quintal, stressed the pressures on Mr. Kessack in the situation of the proffer. Specifically, Mr. Marshall noted,

> "Obviously, when he's proposing to plead guilty as part of a proffer, he's not there to say I'm not culpable at all. On the other hand, if he's going to get any benefit from the government, he has to say not only am I culpable, but I can help you convict other people, so here's all I can tell you about all these other people. And if he says I don't know anything about the other people, then he's not giving the government any incentive to make him a bargain.
>
> So, the pressure on him is to accept blame for himself but also to pile it on the other people whom the government wants his help in convicting." (July 6, 1990 Sentencing Hearing Transcript[3], p. 69, lines 4-15).

Attorney Meltzer, counsel for John Brownwood, pointed out to the district court that without the benefit of cross-examination, the court would not know how

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[3] Hereinafter referred to as "SHT".

to view the Statement of Kessack. Mr. Meltzer reminded the court that it had already heard from one witness, Mr. Gaydos, and decided to disregard that witness' testimony when cross-examination demonstrated that testimony to be unreliable.

Over the objections of defense counsel, the district court reviewed the Statement. On July 13, 1990, the court notified the appellants that it had reviewed the Statement and had considered its content for purposes of sentencing.

On July 23, 1990, Mr. Kessack made a second sworn statement in which he cast substantial doubt on the accuracy and reliability of his first Statement. Specifically, Mr. Kessack later described his original statement as follows: He had been advised that he was facing a possible sentence in excess of 30 years and that

"the only way" he could hope for a lesser sentence "was to cooperate with the government." He then "agreed to provide a statement to the government in the hope that I could convince the government to recommend a lesser sentence for me." The government lawyers "told me that if I minimized my role, or the role of others, that I would be "worthless as a witness" and that they would have "no interest in dealing with me". They also told me that it didn't matter how many kilos I said were involved, since nothing I said could or would be used against me...The government insisted that I could remember things, even when I knew that I couldn't...I was especially confused about the amounts of drugs involved and the sources of the drugs. I can't really be sure of the total amounts involved and the sources of cocaine."

On July 27, 1990, the sentencing hearing continued. The court indicated it had read both statements of Mr. Kessack. With respect to the original Statement, the court said,

> "I believe that the presumption is against my considering the sworn statement, but that based on all of the evidence it's my tentative ruling that I can consider it, that there is substantial evidence in the record to support the Kessack statement and unless it's corroborated by other testimony, I'm not going to consider matters in the statement. But I believe that it does provide additional reliable material which the sentencing judge can consider" (July 27, 1990 SHT, p. 152, lines 2-9, emphasis added).

The court then heard argument from counsel as to why the court should or should not consider Mr. Kessack's original Statement in imposing sentence on the remaining defendants. Mr. Troberman, counsel for Robert Petty, argued that the Statement was inherently unreliable and

should therefore not be considered in sentencing. Specifically, he stated,

> "The fact is Mr. Kessack was told that we know there is at least this many kilos and if we hear that there's less, we're not interested in talking to you. It was clear that he was told there was 50. It was clear he was told if he minimized the role of anybody, including himself, he would be worthless as a witness, those were the government's words, and that the government would not deal with him.
>
> He had every incentive at that point, Your Honor, to maximize the amount of cocaine involved. Indeed, the government told him, 'You cannot hurt yourself no matter what you tell us with respect to the number of kilos because everything you say today cannot be used against you.' Mr. Kessack had every reason if he had any doubt at all to exaggerate the numbers. That he in fact did that is also evident from the transcript itself wherein he tells the government that he obtained 40 kilos from Mr. Newton. Mr. Newton, of course, at trial testified that there were ten kilos, so there is at least a four-time maximization by Mr. Kessack as to Mr. Newton's kilos.
>
> It's also clear that Mr.

> Kessack told the government in various instances, 'I can't remember,' and the government said, 'We're not buying it. You do remember. Don't shine me on. You remember' That's word for word from the transcript, Your Honor.
>
> Now, under those circumstances, coupled with Mr. Kessack's later statement saying, 'I really didn't remember but I took my best shot because the government wasn't going to deal with me if I didn't tell them something,' I do not understand how this Court can find those statements reliable" (July 27, 1990 SHT, p. 154, line 11 to p. 155, line 13).

The district court concluded,

> "Under all the circumstances, I feel substantial indicia of reliability has been presented by other corroborating evidence to rebut the presumption of unreliability of Mr. Kessack's sworn statement. I therefore feel that I should and must consider it. I have done so" (July 27, 1990 SHT p. 170, lines 14-18).

Based upon the original Statement, the court found that the entire conspiracy involved more than 50 kilograms of cocaine.

The court sentenced Pascal Debraine and his co-defendants on the 50-kilogram basis. Petitioners object to the use of the Statement for purposes of determining their sentence.

ARGUMENT

A. THE CONFRONTATION CLAUSE MUST APPLY AT SENTENCING IN THE FEDERAL CRIMINAL CONTEXT

1. Is a Sentencing Hearing Part of a "Criminal Prosecution" as Set Forth in the Sixth Amendment?

The Sixth Amendment declares: "In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him...".

The first question that must be considered in the instant case is whether or not sentencing proceedings are "criminal prosecutions" under the Sixth Amendment.[4] This Court has never answered this question directly. In Spaziano v. Florida, 468 U.S.

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4 See Appendix A, Dissent p. 83.

447, 459 (1984), the Court held that the Sixth Amendment right to jury trial does not apply at sentencing. The Court, however, reached this conclusion by observing the historic exclusion of juries from the sentencing process. This Court has also held that the Sixth Amendment right to counsel applies at a sentencing hearing Mempa v. Rhay, 389 U.S. 128, 134-35 (1967).

The plain meaning of the term "criminal prosecution", however, suggests that the term was meant to include sentencing hearings. Furthermore, if the sentencing hearing is part of a "criminal proceeding" for purposes of the Sixth Amendment right to counsel, it logically follows that the sentencing hearing is part of a "criminal proceeding" for purposes of the Sixth Amendment right to confront witnesses. "One might contend that if one

clause of the Sixth Amendment applies, the others should as well". See: Note, An Argument for Confrontation Under the Federal Sentencing Guidelines, 105 Harv. L. Rev. 1880, 1889 (1992).

This Court must grant certiorari to determine this critical threshold issue.

2. Assuming Sentencing is Part of a "Criminal Prosecution" Under the Sixth Amendment, the Confrontation Clause Must Apply at Sentencing: The Ninth Circuit Erred in its Interpretation of Williams v. New York.

In Williams v. New York, 337 U.S. 241 (1949) this Court held that courts may consider hearsay at sentencing. The rationale in Williams, however, no longer applies in contemporary federal criminal courts which utilize the United States Sentencing Guidelines.

In Williams, the Supreme Court confirmed a state sentencing judge's right to sentence a defendant on the basis of information contained in a presentence

report that the defendant had no opportunity to rebut. In rejecting the defendant's claim that this violated due process, the Supreme Court emphasized that broad discretion in selecting punishment had long been the prerogative of American courts. Id. at 246, emphasis added. The Williams court also held that the rehabilitative purpose of punishment required that the court have the fullest information possible, unencumbered by evidentiary or procedural obstacles. Id. at 247.

With the enactment of the Sentencing Guidelines, "broad discretion" and "the rehabilitative purpose of punishment" were thrown out the window. Consequently, the rationale in Williams which supported consideration of hearsay at sentencing is no longer applicable in the federal criminal courts today. The Sentencing

Reform Act states specifically that rehabilitation is NOT a purpose of sentencing. See 28 U.S.C. Section 994(d) (1988). In addition, sentencing under the Guidelines today is a fully adversarial proceeding. This is true in at least three ways:

> "First, in the past, a defendant had only a limited incentive to dispute facts at sentencing because the significance of any fact to the judge's eventual decision was uncertain; now, particular facts have discrete and predictable consequences. Thus, it will often be in the defendant's interest to dispute sentencing facts. Second, although it might once have been plausibly argued that the prosecution and the defense shared an interest in the defendant's rehabilitation, no such unity can now be claimed. Today, the prosecutor aims to maximize the sentence to serve better the aims of retribution and deterrence, and the defense tries to minimize the sentence while seeking adequate accountability. Moreover, even though the PSI serves as the main source of sentencing information, field research reveals that probation officers often rely

> almost exclusively on prosecutors' files for information. Third, the facts that are now relevant under the rehabilitative scheme, because they implicate claims about the offense of conviction or other related offenses rather than claims about the offender's background" (Note: An Argument For Confrontation Under the Federal Sentencing Guidelines, 105 Harv. L. Rev. 1880, 1886 (1992), citing Gerald W. Heaney, The Reality of Guidelines Sentencing: No End to Disparity, 28 Am. Crim. L. Rev. 161, 172-3 (1991).

Today, "...facts accepted as established at the sentencing hearing determine the sentence, in some instances with mathematical exactitude. In drug cases, the quantity of drugs possessed or distributed mechanically sets the limits of the sentence that must be given" See Appendix A, Dissent, p. 85, citing U.S.S.G. Section 2D1.1. In the Federal criminal context today, a co-defendant's confession used against a defendant at sentencing amounts to substantive evidence against the

defendant. This is not permitted at trial without the right to confront and cross-examine.

In today's federal criminal context, a co-defendant's out of court statement that the defendant conspired to distribute 50 kilograms of cocaine can be used against that defendant at sentencing. The hearsay statement regarding 50 kilograms of cocaine translates with mathematical precision into years in custody for the defendant. The hearsay statement is presumed reliable and it is the defendant who must demonstrate otherwise. With these practical realities, why should the Confrontation Clause apply at trial but not at sentencing in Federal Court?

In its opinion below, the Ninth Circuit majority blindly accepted the Williams holding that "courts may consider hearsay at sentencing". Period. The Ninth

Circuit did not consider the rationale in Williams and the failure of that rationale to apply to modern federal criminal sentencing. This failure in reasoning constitutes error on the part of the Ninth Circuit majority in this opinion. The Ninth Circuit's error was of constitutional magnitude. This Court must expand upon its holding in Williams in light of the one hundred eighty degree shift the Sentencing Guidelines have brought to federal criminal practice.

3. "The Guidelines Must Yield to the Constitution, Not the Constitution to the Guidelines"

After blindly accepting the principle set forth over 40 years ago in Williams, the Ninth Circuit majority concluded that the Sentencing Guidelines do not change the Williams' rule that hearsay may be relied upon at sentencing. Judge Noonan, in his dissent, writes:

> "The majority opinion makes the point that the Sentencing Guidelines themselves explicitly allow a sentencing court to consider information without regard to its admissibility and 'there is no language in the Guidelines' requiring the application of the Confrontation Clause. To use the Sentencing Guidelines to interpret the Confrontation Clause is to let the tail wag the dog. The Sentencing Guidelines are the work of an ad hoc committee. The Constitution sets the structure of our system. The Guidelines must yield to the Constitution, not the Constitution to the Guidelines" Id. p. 85.

Section 6A1.3 of the Guidelines sets forth a policy statement regarding resolution of disputed factors. Subsection (a) provides:

> "When any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor. In resolving any reasonable dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of

evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy" (emphasis added).

The Commentary to this section is interesting and lends support to Petitioners' argument that the right of confrontation should apply at sentencing:

> "In pre-guidelines practice, factors relevant to sentencing were often determined in an informal fashion. The informality was to some extent explained by the fact that particular offense and offender characteristics rarely had a highly specific or required sentencing consequence. This situation will no longer exist under the sentencing guidelines. The court's resolution of disputed sentencing factors will usually have a measurable effect on the applicable punishment. More formality is therefore unavoidable if the sentencing process is to be accurate and fair. Although lengthy sentencing hearings should seldom be necessary, disputes about sentencing factors must be resolved with care. When a reasonable dispute exists about any factor important to the sentencing determination, the court must ensure that the

parties have an adequate opportunity to present relevant information. Written statements of counsel or affidavits of witnesses may be adequate under many circumstances. An evidentiary hearing may sometimes be the only reliable way to resolve disputed issues. See United States v. Fatico, 603 F.2d 1053, 1057 n.9 (2d Cir. 1979). The sentencing court must determine the appropriate procedure in light of the nature of the dispute, its relevance to the sentencing determination, and applicable case law.

"In determining the relevant facts, sentencing judges are not restricted to information that would be admissible at trial. 18 U.S.C. Section 3661. Any information may be considered, so long as it has "sufficient indicia of reliability to support its probable accuracy." United States v. Marshall, 519 F. Supp. 751 D.C. Wis. 1981), aff'd, 719 F.2d 887 (7th Cir. 1983); United States v. Fatico, 579 F.2d 707 (2d Cir. 1978). Reliable hearsay evidence may be considered. Out-of-court declarations by an unidentified informant may be considered "where there is good cause for the nondisclosure of his identity and there is sufficient corroboration by other means." United States v. Fatico, 579 F.2d at 713. Unreliable allegations shall not be

considered. United States v. Weston, 448 F.2d 626 (9th Cir. 1971) (emphasis added).

> "The Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case."

The Ninth Circuit majority notes Section 6A1.3(a) and its commentary and accepts what the Sentencing Commission has written as The Truth. The Sentencing Commission is an ad hoc committee. The function of that committee is not to interpret the Constitution. That function is left to the courts and the Ninth Circuit has failed in that function. Consequently, it is left to this Court to determine whether the right to confront and cross-examine witnesses should apply at sentencing in light of the mathematical exactitude with which facts presented at sentencing convert into years in custody

for the defendant.

"The combination of fact-driven penalty determinations with informal fact finding procedures is problematic." Note, An Argument for Confrontation Under the Federal Sentencing Guidelines, 105 Harv. L. Rev. 1880, 1880 (1992). Liberal fact-finding procedures such as those employed by the district court below are certain to generate unreliable evidence. Use of unreliable evidence in sentencing undermines the goal of uniformity in sentencing. Because the circuits have failed to give this conflict ample attention and have failed to reason through this problem adequately, this Court must resolve this issue properly.

The Ninth Circuit majority correctly observes that virtually all of the circuits have held that the Confrontation Clause does not apply at sentencing,

notwithstanding the enactment of the Guidelines. (See United States v. Tardiff, 969 F.2d 1283, 1287 (1st Cir. 1992); United States v. Kikumura, 918 F.2d 1084, 1102-03 (3d Cir. 1990); United States v. Johnson, 935 F.2d 47, 50 (4th Cir.), cert. denied, ___U.S.___, 112 S.Ct. 609 (1991); United States v. Marshall, 910 F.2d 1241, 1244 (5th Cir. 1990), cert. denied, ___U.S.___, 111 S.Ct.976 (1991); United States v. Silverman, 976 F.2d 1502 (6th Cir. 1992) (en banc); United States v. Wise, 976 F.2d 393 (8th Cir. 1992) (en banc); United States v. Beaulieu, 893 F.2d 1177, 1180 (10th Cir.), cert. denied, 110 S.Ct. 3302 (1990). With its decision in the instant case, the Ninth Circuit has joined the ranks in violating the Sixth Amendment rights of defendants.

Furthermore, the rulings of the circuits are contrary to this Court's

rulings in Specht v. Patterson, 386 U.S. 605 (1967) and McMillan v. Pennsylvania, 477 U.S. 79, 88 (1986). In Specht, this court held that trial-like procedural protections apply at sentencing only if an entirely new and more serious charge is added at sentencing without notice OR "any 'hearing in the normal sense.'" McMillan at p. 88 (emphasis added). Today, most federal criminal cases are resolved by guilty pleas[5]. Consequently, the only "hearing in the normal sense" that most

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5 In his dissent (p. 84), Judge Noonan cites the U.S. Sentencing Commission, The Federal Sentencing Guidelines: A Report on the Operations of the Guidelines Sys. and Short-Term Impacts on Disparity in Sentencing, Use of Incarceration, and Prosecutorial Discretion and Plea Bargaining 69 (Dec. 1991). Judge Noonan notes, "The normal outcome of a federal criminal prosecution is a plea of guilty. In 318,737 federal investigations in the period 1987-1989, there were 165,757 indictments, and there were 116,619 guilty pleas. Eighty-six percent of criminal prosecutions resolved from 1987 through 1989 were terminated without trial" (emphasis added).

defendants receive is the sentencing hearing. It then follows that trial-like procedural protections should apply at sentencing in the contemporary federal criminal context. Most certainly, constitutional protections, such as the right to confront and cross-examine witnesses should apply in certain circumstances.

B. THE HEARSAY STATEMENT WAS INHERENTLY UNRELIABLE; AS SUCH, ITS USE AT SENTENCING VIOLATED PETITIONERS' DUE PROCESS RIGHTS

1. Introduction

Regardless of whether the Confrontation Clause should have applied at Sentencing, Petitioners' due process rights were violated when they were sentenced based upon the Statement made by Mr. Kessack. The Statement was inherently unreliable. The Ninth Circuit majority approved of the district court's treatment of the statement as "presumptively

unreliable". The majority also approved of the district court's determination that when the statement was considered with other corroborating evidence, the presumption of unreliability was rebutted.

The majority erred in two respects: 1) Kessack's Statement and the circumstances under which it was given, and the circumstances following the making of the statement (i.e. a detailed retraction) were so inherently unreliable that the presumption could not have been rebutted; 2) it was error to permit the use of extrinsic corroborating evidence to "rehabilitate" the unreliable statement. While it is true that the district court's evaluation of reliability is reviewed under an abuse of discretion standard, the district court clearly abused its discretion in this case. United States v. Ayers, 924 F.2d 1468, 1481 (9th Cir. 1991).

The district court's errors as well as the Ninth Circuit majority's errors in evaluating the conduct of the district court, are discussed more fully below.

2. Reliance Upon the Statement Violated Precedents Set By This Court

At sentencing, judges may consider a wide variety of information. Williams v. New York, 337 U.S. 241 (1949). But when a trial judge relies on materially false or unreliable information in sentencing, the defendant's due process rights are violated. United States v. Ruster, 712 F.2d 409, 412 (9th Cir. 1983).

A defendant challenging information used in sentencing must show such information is (1) false or unreliable, and (2) demonstrably made the basis for the sentence. United States v. Ibarra, 737 F.2d 825, 827 (9th Cir. 1984), citing Farrow v. United States, 580 F.2d 1339,

1359 (9th Cir. 1978) (en banc). Challenged information is "false or unreliable" if it lacks "some minimal indicium of reliability beyond mere allegation". United States v. Ibarra 737 F.2d 825, 827 (9th Cir. 1984), citing United States v. Baylin, 696 F.2d 1030, 1040 (3d Cir. 1982), construing United States v. Weston, 448 F.2d 626, 633-34 (9th Cir.), cert. denied, 404 U.S. 1061 (1971). Quite simply, a sentence cannot be founded on misinformation of a constitutional magnitude United States v. Tucker, 404 U.S. 443 (1972).

The decision of the Ninth Circuit flies in the face of rulings of this Court and rulings of circuits across the country. Opinions of various circuits regarding unreliable hearsay support the argument that the hearsay used against Petitioners in this case was "misinformation of a constitutional

magnitude".

This court has set forth the standards for identifying inherently unreliable hearsay and standards for its use. A hearsay declarant's statement is admissible only if it bears adequate "indicia of reliability". Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness Ohio v. Roberts, 448 U.S. 56 (1980). In opinions following Roberts, this Court recognized that co-conspirator statements to law enforcement are "inherently unreliable". (See Lee v. Illinois, 476 U.S. 528 (1986).

The admission of Mr. Kessack's hearsay statement violated this Court's ruling in Idaho v. Wright __U.S.__, 110 S.Ct. 3139

(1990). In Wright, defendant was convicted of two counts of lewd conduct with a minor. He appealed from the conviction involving the younger of the two children. The State Supreme Court reversed. The United States Supreme Court affirmed the reversal and held that the admissions of the child's hearsay statements violated defendant's Confrontation Clause rights.

The Court began its analysis with a reference to its holding in Ohio v. Roberts. The Wright court stated that the guarantees of trustworthiness must be shown from the totality of the circumstances that surround the making of the statement that is sought to be admitted. Evidence possessing "particularized guarantees of trustworthiness" must be so trustworthy that adversarial testing would add little to its reliability Id. pp. 3148-3149.

The Court also found that in order to

be admissible under the confrontation clause, hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, NOT by reference to other evidence at trial and, thus, evidence corroborating the truth of the statement cannot support a finding that the statement bears the requisite particularized guarantees of trustworthiness. In other words, the party offering the hearsay may NOT point to extrinsic, corroborating evidence to support the reliability of the hearsay statement being offered.

The Wright court also held that in determining the reliability of the hearsay statement, it was proper for the trial court to consider the suggestive manner in which the witness' interview was conducted.

In this case, it can hardly be said that the statement was "so trustworthy that

adversarial testing would add little to its reliability". Wright involved hearsay statements of a child victim. One of the problems with the hearsay statement was that it was given in response to suggestive questions. Suggestive questioning is also present here. In this case, Kessack admitted that during the proffer, "the government insisted that I could remember things, even when I knew I couldn't... I was especially confused about the amounts of drugs involved ..."

The district court below also erred by "bootstrapping" extrinsic evidence suggesting reliability to the statement. Wright, however, clearly states that such bootstrapping is not permitted. Wright says that hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to the

evidence extrinsic to the hearsay. Extrinsic evidence that may corroborate the truth of the hearsay statement cannot be used to support a finding that the statement bears the requisite particularized guarantees of trustworthiness. The district court's comments on the record prove its violation of this Court's holding in Wright.

With respect to Kessack's statement, the district court said,

> "I believe that the presumption is against my considering the sworn statement, but that based on all of the evidence it's my tentative ruling that I can consider it, that there is substantial evidence in the record to support the Kessack statement and unless it's corroborated by other testimony, I'm not going to consider matters in the statement. But I believe that it does provide additional reliable material which the sentencing judge can consider" (July 27, 1990 SHT, p. 152, lines 2-9, emphasis added).

The district court concluded.

"Under all the circumstances, I feel substantial indicia of reliability has been presented by other corroborating evidence to rebut the presumption of unreliability of Mr. Kessack's sworn statement. I therefore feel that I should and must consider it. I have done so" (July 27, 1990 SHT p. 170, lines 14-18).

3. **Reliance Upon the Statement Violated Rulings of Circuits Across the County.**

The majority opinion below is also inconsistent with the holdings of its own circuit and circuits across the country.

The Fifth Circuit recently issued an opinion that reflects the Ninth Circuit majority's failure to adequately evaluate the issues before it in this case. The Fifth Circuit's recent opinion further reflects the confusion and conflict among the circuits in applying Idaho v. Wright, and therefore highlights the need for adjudication by this Court.

In United States v. Flores, 985 F.2d

778 (5th Cir. 1993), the Fifth Circuit held that grand jury testimony by an accomplice that implicates both the accomplice and a defendant is not sufficiently reliable to be admissible against both the accomplice and the defendant at a joint trial.

In Flores, the government surveilled a marijuana shipment which revealed some involvement by Navarro. Navarro ultimately made a confession and then testified before the grand jury. Navarro's grand jury testimony implicated himself and Flores, among others. Flores and Navarro were both indicted and tried together. Navarro did not testify and his grand jury testimony was admitted against both he and Flores. The district court had considered corroborating evidence in determining that the testimony was sufficiently reliable to overcome Conformation Clause objections, which was subsequently disallowed by

Wright.

The Flores court further recognized that permitting introduction of grand jury testimony by an accomplice against a defendant would, in essence, give the government the power to take ex parte evidentiary depositions! Permitting introduction of proffer sessions between government agents and defendants trying to talk their way to a §5K1.1 [6] reduction poses the same danger!

The Flores holding reflected the Fifth Circuit departure from its earlier decision in United States v. Vernor, 902 F.2d 1182 (5th Cir. 1990) where the court found that a custodial confession by a father that implicated his son in a bank robbery sufficiently reliable to be admissible against the son when the father refused to

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[6] United States Sentencing Guidelines Section 5K1.1

testify. This Court's subsequent decision in Idaho v. Wright undercut Vernor, and the Fifth Circuit's decision in Flores acknowledges this and gives a new look at Lee v. Illinois, 476 U.S. 530 (1987).

In the instant case, petitioners' due process rights were violated when the district court considered evidence extrinsic to Kessack's statement in order to rebut the presumption of unreliability. The Ninth Circuit failed to recognize the district court's violation of Wright. Therefore, this court should grant certiorari in order to amend the violation of petitioner's due process rights.

In United States v. Magana-Olvera, 917 F.2d 401 (9th Cir. 1990), defendant was convicted of conspiracy to distribute cocaine and using a firearm in furtherance of a drug trafficking crime. Defendant appealed, arguing that the district court

abused its discretion in admitting hearsay statements of a coconspirator, as those statements were not sufficiently against the coconspirator's penal interest to be admissible under the exception to the hearsay rule.

An investigating agent told the co-conspirator that in exchange for his cooperation, he might receive lenient treatment in two pending cases. The co-conspirator then agreed to cooperate and identified defendant as his supplier. The co-conspirator further promised to testify against defendant, but broke this promise at trial. The district court admitted the hearsay statements of the co-conspirator through the testimony of the investigating agent.

The Ninth Circuit held that the district court abused its discretion in admitting the hearsay statements. The

Ninth Circuit began its analysis by reviewing Federal Rule of Evidence 804(b)(3) which states in pertinent part:

> "The following are not excluded by the hearsay rule if the declarant is unavailable as a witness...a statement which was at the time of its making...[one that] so far tended to subject [the declarant] to...criminal liability ...that a reasonable person in the declarant's position would not have made the statement unless believing it to be true."

The Ninth Circuit observed that "the latter requirement is vital" and that "it requires that the statement be made under conditions that suggest the sincerity and reliability of the declarant" Id. 407. The court reasoned that in order to determine whether a reasonable person in the co-conspirator's shoes would not have made the statements unless true, one must consider the circumstances under which the co-conspirator spoke (emphasis added). Looking at the circumstances in the case

before them, the court concluded that a reasonable person in the co-conspirator's shoes may well have made the statements even if they were not true. The court stated,

> "A drug dealer who discovers in jail that one of his customers was an undercover agent has a powerful incentive to minimize the damage of an almost certain criminal conviction. That incentive becomes nearly irresistible when the agent uses a federal indictment as a stick, and a promise of leniency as a carrot" Id. 407-408.

The Ninth Circuit concluded that the co-conspirator's statements were not sufficiently against his interest because: "1) they were made under custody; (2) they were made in an attempt to curry favor from the federal authorities; (3) the government encouraged his cooperation by suggesting that it could cut his prison time in half if he cooperated; and (4) the statements trivialized [the co-conspirator's] role in

the drug conspiracy by pointing to [the defendant] as the 'kingpin'" Id. 409. Because the admission of the co-conspirator's hearsay was an abuse of the district court's discretion under Federal Rule of Evidence 804(b)(3), it was necessarily a violation of the defendant's rights under the Confrontation Clause of the Sixth Amendment.

An examination of the circumstances under which Kessack made the Statement further proves it utterly unreliable. As in Magana, a reasonable person in Kessack's shoes may well have made the statements even if they were not true. As in Magana, Kessack's incentive to, at the very least, round upward when estimating what quantities of cocaine were involved in the conspiracy, was "nearly irresistible". As in Magana, the agents used the indictment against Kessack as the stick, and a promise

of leniency as a carrot.

In United States v. Gonzalez, 559 F.2d 1271 (5th Cir. 1977) defendant appealed his conviction after grand jury testimony of a co-conspirator was used against him at trial. The Fifth Circuit held that the transcript of the grand jury testimony was inadmissible hearsay because it did not qualify as a statement against interest or as a statement with equivalent circumstantial guarantees of trustworthiness.

The Fifth Circuit concluded that the statements did not fall under Fed.R.Evid. 804(b)(3) for several reasons. First, since the co-conspirator had been given immunity, his statement could not subject him to criminal liability. The court continued,

> "In addition the pressures put on him by the prosecutor and the grand jury to testify would seem to make the giving of

> testimony to be in his best interest, rather than against it...He obviously decided it was to his best interest to testify. Given the prosecutor's offer of immunity for offenses concerning this marijuana transaction, the only civil or criminal liability that he could face at the time would occur if he did not testify. Thus, whether he told the truth or not was incidental to what would happen to him if he did not say something...The important thing to him was that he gave an answer, be it truth or not. Under these circumstances, it cannot be said that 'a reasonable man in his position would not have made the statement unless he believed it to be true'" Id. 1273, emphasis in original.

The court also concluded that the statement did not have "equivalent circumstantial guarantees of trustworthiness" pursuant to FRE 804(b)(5). The court specifically noted that the grand jury testimony was given to leading questions which would not have been permitted at trial. "Such questions are prohibited on the rationale that they might

possibly distort the truth of the answers" Id. 1273. The court also considered that if the co-conspirator were fearful that physical harm could come to him or his family, he would have some incentive not to tell the truth. Finally, the court noted, "...the testimony was not cross-examined, was readily accepted at first telling, and was unsupported by detailed facts concerning [defendant]" Id. 1273. "A rational penal system must have some concern for the probable accuracy of the informational inputs in the sentencing process". United States v. Weston, 448 F.2d 626, 634 (9th Cir. 1971).

As in Gonzalez, Mr. Kessack was in a situation where providing a statement was clearing in his best interest. He was told that nothing he said would be used against him. He also knew that in order to receive any benefit for himself, the content of his

statement had to be of some value to the agents questioning him. As in Gonzales, Mr. Kessack's legal troubles would only decrease if he gave a statement. As in Gonzales, "the important thing to him was that he gave an answer, be it truth or not".

CONCLUSION

Petitioners were sentenced based upon a hearsay statement made under completely unreliable circumstances. Under the Sentencing Guidelines, the amount of drugs referenced in that statement corresponded with mathematical exactitude to years in custody for petitioners.

This court must update its 1949 ruling in Williams v. New York, in light of the realities of the Sentencing Guidelines. None of the circuit courts have adequately considered the application of the Sixth Amendment right to confront and cross-

examine witnesses at sentencing following the enactment of the Sentencing Guidelines.

Even if this Court were to hold that the confrontation right still does not apply at sentencing, the Ninth Circuit's opinion must be reversed. The circumstances under which Kessack's Statement was made were totally unreliable. Furthermore, the district court corroborated the Statement with evidence extrinsic to the Statement. This is expressly forbidden in this Court's earlier ruling in Idaho v. Wright in 1990.

Therefore, Petitioners pray that this Court issue a petition for writ of Certiorari to the Ninth Circuit, together with any and all other relief deemed necessary and just.

Respectfully submitted,

Dated: 8/19/93

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APPENDIX A

PUBLISHER'S NOTE :

ORIGINAL PAGINATION IS NOT CONTINUOUS.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. ROBERT M. PETTY, *Defendant-Appellant.*	No. 90-30291 D.C. No. CR-89-272-Z
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. MELVIN L. DEWITT, *Defendant-Appellant.*	No. 90-30292 D.C. No. CR-89-272-Z
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. PASQUAL DEBRAINE, *Defendant-Appellant.*	No. 90-30293 D.C. No. CR-89-272-Z

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JORDAN RODRIGUES QUINTAL, JR.,
Defendant-Appellant.

No. 90-30294
D.C. No.
CR-89-272-Z
OPINION

Appeal from the United States District Court
for the Western District of Washington
Thomas S. Zilly, District Judge, Presiding

Argued and Submitted
February 7, 1992—Seattle, Washington

Filed January 7, 1993

Before: Procter Hug, Jr., John T. Noonan, Jr. and
David R. Thompson, Circuit Judges.

Opinion by Judge Thompson; Dissent by Judge Noonan

SUMMARY

Individual Rights/Constitutional Rights/Criminal Law and Procedure/Sentencing/Due Process/Defendants and Accused, Rights of/Witnesses

Affirming district court judgments of sentence, but remanding for reconsideration the sentences imposed on two other appellants, the court of appeals held that neither the Confrontation Clause nor due process requirements were violated when the district court considered a coconspirator's sworn, post-arrest statement, given in the course of plea bargaining with the government, against other defendants at sentencing.

Appellants Donald Craig Kessack, Robert M. Petty, Melvin L. Dewitt, Pasqual Debraine and Jordan Rodriguez Quintal, Jr., were arrested for their involvement in a conspiracy to distribute cocaine. In the course of a plea bargaining with the government, Kessack gave a statement under oath on the condition that the government would not use the information against him in any other way than to impeach him if he later testified inconsistently with the proffer. Negotiations failed, there was no plea agreement, and all appellants were convicted. Kessack was sentenced without the sentencing court seeing the statement. At the sentencing of the other coconspirators, the government called Kessack as a witness. When Kessack refused to testify, the sentencing court unsealed and reviewed the statement given by Kessack for purposes of sentencing. However, the reliability of this statement was cast in doubt when Kessack made a second sworn statement. Based on information in the first statement, which the sentencing court determined was corroborated by other evidence, the court imposed sentence on the coconspirators. The appellants challenged the use of Kessack's first statement in sentencing them as in violation of both the Due Process Clause and the Confrontation Clause.

[1] Initially, the court rejected the argument that because the statement at issue was hearsay the Confrontation Clause barred its consideration at sentencing. [2] Nothing in the Sentencing Guidelines requires the application of the Confrontation Clause at sentencing, and [3] other circuits have so found. [4] However, although the Confrontation Clause does not apply at sentencing, a defendant clearly has a due process right not to be sentenced on the basis of materially incorrect information. Due process requires that some minimal indicia of reliability accompany a hearsay statement. [5] Here, the sentencing court did not abuse its discretion in concluding that the statement, when viewed in light of the corroborating evidence, was sufficiently reliable. [6] Nor did the sentencing court erred in using evidence independent from the statement to rebut the presumption of its unreliability. The court agreed

that while a court is precluded from using extrinsic corroborating evidence to establish the reliability of hearsay at trial, the court is not precluded from using such evidence to establish the reliability of hearsay at sentencing.

Dissenting, Judge Noonan stated that fundamental constitutional principles called for a different result. If sentencing is part of a criminal proceeding in determining the right to counsel, then it followed that sentencing is also a criminal prosecution in determining the right to confront witnesses. Although the denial of cross-examination calls into question the Confrontation Clause, if the ultimate integrity of the fact-finding process has been undermined, due process itself has been denied.

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Jerry Diskin, Assistant United States Attorney, Seattle, Washington, for the plaintiff-appellee.

OPINION

THOMPSON, Circuit Judge:

Robert M. Petty, Melvin L. Dewitt, Pasqual Debraine and Jordan Rodrigues Quintal, Jr. challenge the use of a coconspirator's post-arrest statement against them at the sentencing phase of the criminal process. Other issues involving these defendants have been dealt with in an unpublished memorandum disposition. A separate sentencing issue raised by Petty and Quintal is dealt with in a separate opinion filed herewith.

The issue dealt with in this opinion is novel: In sentencing under the Sentencing Guidelines, may the court rely on the sworn, post-arrest admissions of an unavailable coconspirator given by him in the course of plea bargaining with the government?

FACTS

Donald Craig Kessack was the kingpin in a conspiracy to distribute cocaine. After his arrest, he began plea negotiations with the government. On October 31, 1989, as part of these negotiations, he proffered a statement under oath to the government ("the Statement"). The proffer was made to induce the government to agree to a plea bargain. It was made on the condition that the government would not use the information against Kessack in any way other than to impeach him if he later gave testimony inconsistent with the proffer.

Kessack's negotiations failed. There was no plea agreement. He went to trial with his coconspirators, including the defendants mentioned in this appeal.

Kessack and the others were convicted on April 4, 1990. The government then moved for the sentencing of Kessack, and he was sentenced without the court seeing the Statement. Two weeks later, the sentencing hearing of the other defendants was held. The government called Kessack as a witness. He refused to testify on the ground of his privilege against self-incrimination. On the government's motion, the district court entered an order compelling him to testify. Kessack persisted in his refusal to answer any questions. The government then asked the court to unseal and review the Statement. The court did so and on July 13, 1990 notified the appellants that it had reviewed the Statement and had considered its content for purposes of sentencing.

On July 23, 1990 Kessack made a second sworn statement in which he cast doubt on the accuracy and reliability of his

first Statement. The sentencing hearing then resumed on July 27, 1990. Based on information in the Statement, which the court determined was corroborated by other evidence, the court found that the entire conspiracy involved more than 50 kilograms of cocaine. The court sentenced Petty and Debraine on the 50-kilogram basis, and Quintal and DeWitt on the 15-49.99-kilogram basis. Quintal and DeWitt received the lower basis because the court determined that it could not find by a preponderance of the evidence that Quintal and DeWitt were involved during the entire period of the conspiracy, or that they dealt with 50 kilograms or more of cocaine, or that they knew or had reason to know that levels of 50 kilograms or more would be dealt with by the conspiracy. All four defendants appeal the use of the Statement.

ANALYSIS

The appellants first contend that because the Statement is hearsay, the Confrontation Clause bars its consideration at sentencing.[1] We reject this argument.

[1] In *Williams v. New York*, 337 U.S. 241 (1949), the Supreme Court held that courts may consider hearsay at sentencing. The Sentencing Guidelines do not change this. The Guidelines explicitly allow a sentencing court to consider information relevant to the sentencing determination "without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy." U.S.S.G. § 6A1.3(a). The commentary to section 6A1.3(a) provides:

> In determining the relevant facts, sentencing judges are not restricted to information that would be admissible at trial. 18 U.S.C. § 3661. Any informa-

[1] "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. Const. amend. VI.

> tion may be considered, so long as it has "sufficient indicia or reliability to support its probable accuracy." *United States v. Marshall*, 519 F. Supp. 751 (D.C. Wis. 1981) [sic], *aff'd*, 719 F.2d 887 (7th Cir. 1983); *United States v. Fatico*, 579 F.2d 707 (2d Cir. 1978). Reliable hearsay evidence may be considered. Out-of-court declarations by an unidentified informant may be considered "where there is good cause for the nondisclosure of his identity and there is sufficient corroboration by other means." *United States v. Fatico*, 579 F.2d at 713. Unreliable allegations shall not be considered. *United States v. Weston*, 448 F.2d 626 (9th Cir. 1971).

U.S.S.G. § 6A1.3 comment.; *see also United States v. Beaulieu*, 893 F.2d 1177, 1180 (10th Cir.) (the Guidelines were not intended to place new restrictions on the sources of information available to the sentencing judge), *cert. denied*, 110 S. Ct. 3302 (1990).

[2] It is plain there is no language in the Guidelines that requires the application of the Confrontation Clause at sentencing. The question is whether the dramatic changes in the sentencing process brought about by the Guidelines create a constitutional right of confrontation where none existed before.

[3] Of the circuits that have considered this question, all seven have held that the Confrontation Clause does not apply at sentencing, notwithstanding the enactment of the Guidelines.[2] These circuits are the First Circuit in *United States v. Tardiff*,

[2]Three other circuits have held that the due process clause does not require confrontation at sentencing. These circuits are the Second Circuit in *United States v. Carmona*, 873 F.2d 569, 574 (2nd Cir. 1989); the Ninth Circuit in *United States v. Notrangelo*, 909 F.2d 363, 365-66 (9th Cir. 1990); and the Eleventh Circuit in *United States v. Giltner*, 889 F.2d 1004, 1008 (11th Cir. 1989).

969 F.2d 1283, 1287 (1st Cir. 1992); the Third Circuit in *United States v. Kikumura*, 918 F.2d 1084, 1102-03 (3d Cir. 1990); the Fourth Circuit in *United States v. Johnson*, 935 F.2d 47, 50 (4th Cir.), *cert. denied*, __ U.S. __, 112 S. Ct. 609 (1991); the Fifth Circuit in *United States v. Marshall*, 910 F.2d 1241, 1244 (5th Cir. 1990), *cert. denied*, __ U.S. __, 111 S. Ct. 976 (1991); the Sixth Circuit in *United States v. Silverman*, 976 F.2d 1502 (6th Cir. 1992) (en banc); the Eighth Circuit in *United States v. Wise*, 976 F.2d 393 (8th Cir. 1992) (en banc); and the Tenth Circuit in *United States v. Beaulieu*, 893 F.2d 1177, 1180 (10th Cir.), *cert. denied*, 110 S. Ct. 3302 (1990).

In holding that the Confrontation Clause does not apply at sentencing under the Guidelines, the Third Circuit noted that "the procedural protections afforded a convicted defendant at sentencing are traditionally less stringent than the protections afforded a presumptively innocent defendant at trial." *United States v. Kikumura*, 918 F.2d at 1102-03; *see also United States v. Restrepo*, 946 F.2d 654 (9th Cir. 1991) (en banc) (preponderance of the evidence determines the existence of factors enhancing a sentence), *cert. denied*, __ U.S. __, 112 S. Ct. 1564 (1992); *United States v. Tejada*, 956 F.2d 1256, 1263 (2d Cir.) (sentencing courts *must* consider evidence seized in violation of the Fourth Amendment in passing sentence under the Guidelines), *cert. denied*, __ U.S. __, 121 S. Ct. 124 (1992).

Specht v. Patterson, 386 U.S. 605 (1967), is not to the contrary. The Court in *Specht* held that trial-like procedural protections apply at sentencing only if an entirely new and more serious charge is added at sentencing without notice or "any 'hearing in the normal sense.' " *McMillan v. Pennsylvania*, 477 U.S. 79, 88 (1986).

Judge Wellford, dissenting in the vacated opinion of *United States v. Silverman*, explained why *Specht* does not require application of the Confrontation Clause at sentencing:

> First of all, [*Specht*] specifically stated adherence to *Williams v. New York*. What was involved in *Specht* was a "radically different situation" where invocation of the Colorado law being challenged meant "making of a new charge leading to [enhanced] criminal punishment" without a hearing, presence of counsel, opportunity to be heard, or ability to offer evidence of his own. *Specht*, 386 U.S. at 608, 610, 87 S. Ct. at 1211, 1212. *Specht* simply held that Colorado law was deficient for due process reasons because "[i]t makes one conviction the basis for commencing another proceeding under another Act . . . [as] an habitual offender and mentally ill" without "reasonable notice and an opportunity to be heard." *Id.* at 608, 610, 87 S. Ct. at 1211, 1212. There is simply no analogy to the situation presented under state law in *Specht* and the panoply of due process protection afforded these federal defendants at their sentencing hearings. Nor, as asserted by the majority, was *Williams* involved in a "nonadversary" system. A defendant, prior to sentencing guidelines (and after), was represented by counsel as an advocate to speak against any prosecution recommendation or unfavorable information and to offer useful information or evidence on behalf of the defendant.

United States v. Silverman, 945 F.2d 1337 (6th Cir. 1991) (dissenting opinion) (footnote and emphasis omitted), *vacated*, 976 F.2d 1502 (6th Cir. 1992) (en banc).[3]

[4] Although the Confrontation Clause does not apply at sentencing, a defendant clearly has a due process right not to be sentenced on the basis of materially incorrect information. *United States v. Reid*, 911 F.2d 1456, 1463-64 (10th Cir.),

[3]We quote from Judge Wellford's dissent in the vacated *Silverman* opinion not because that opinion has precedential value, but to give Judge Wellford credit for his reasoning.

cert. denied, 111 S. Ct. 990 (1991). Due process requires that some minimal indicia of reliability accompany a hearsay statement. *Id.* at 1464.

While the district court treated the Statement as "presumptively unreliable," it determined that when the Statement was considered with other corroborating evidence, the presumption of unreliability was rebutted. The Statement contained estimates that the conspiracy involved at least 50 kilograms of cocaine. The court indicated the evidence corroborating the Statement included:

> Krohn's testimony with respect to what Kessack was telling him the level of activity was for this conspiracy. Statements made by Mr. Kessack to Agent McElderry about the level of activity and what he could produce. The testimony of Neil Stokes and admissions by Kessack to Stokes of the level of activities of the conspiracy. The post-arrest statements and admissions by defendant Brownwood. The post-arrest admissions by defendant Granger to witnesses Peter Constantine and Gary Annunziata that he was dealing a kilo a month for five years. The tape recorded admissions of the level of activity, exhibit 55, where one of the defendants said ten kilos a week for a six-month period. The testimony of the agents concerning the arrest of Mr. Petty in May of 1984 and the cash he had on his possession and the white powdery substance in his possession or in the possession of his traveling companion at that time. The testimony of other witnesses with respect to substantial amount of cash in Petty's possession in February of 1984.
>
> Under all the circumstances, I feel substantial indicia of reliability has been presented by other corroborating evidence to rebut the presumption of unreliability of Mr. Kessack's sworn statement. I

therefore feel that I should and must consider it. I have done so.

[5] The district court's evaluation of reliability is reviewed under an abuse of discretion standard. *See United States v. Ayers*, 924 F.2d 1468, 1481 (9th Cir. 1991). The court did not abuse its discretion in concluding that the Statement, when viewed in light of the corroborating evidence, was sufficiently reliable.

[6] Furthermore, the sentencing court did not err in using evidence independent from the Statement to rebut the presumption of its unreliability. Although *Idaho v. Wright*, 497 U.S. 805 (1990), precludes a court from using extrinsic corroborating evidence to establish the reliability of hearsay at trial, it does not preclude the use of such evidence to establish the reliability of hearsay at sentencing. We agree with the Third Circuit that the Supreme Court's decision in *Wright* involved an interpretation of the Confrontation Clause and is thus applicable only at trial. *United States v. Kikumura*, 918 F.2d 1084, 1103 n. 21 (3d Cir. 1990) ("In contrast to *Wright*, at a . . . sentencing hearing, the court is free, and indeed is required, to consider other evidence that substantiates the proffered hearsay statement.").

Without squarely addressing the question, other circuit courts have assumed *Wright*'s ban on extrinsic corroborating evidence of hearsay applied to determine reliability at the trial phase only, not the sentencing phase. *See, e.g., United States v. Zuleta-Alvarez*, 922 F.2d 33 (1st Cir. 1990) (hearsay evidence of quantity of drugs admissable at sentencing because corroborated by other witness testimony at grand jury and trial) *cert. denied, Ramirez-Fernandez v. United States*, __ U.S. __, 111 S. Ct. 2039 (1991); *United States v. Holmes*, 961 F.2d 599, 603 (7th Cir.) (corroboration of hearsay statement in presentence report by trial testimony generates sufficient indicia of reliability to be considered by sentencing court), *cert. denied*, __ U.S. __, 113 S. Ct. 232 (1992); *United States*

v. Jewel, 947 F.2d 224 (7th Cir. 1991) (court affirmed enhancement of offense level for obstruction of justice that was based on hearsay allegation corroborated by extrinsic evidence); *United States v. Hubbard*, 929 F.2d 307 (7th Cir.) (hearsay evidence of intent to cause bodily injury under U.S.S.G. § 2K1.4(c)(1) corroborated by physical evidence), *cert. denied*, __ U.S. __, 112 S. Ct. 206 (1991); *United States v. Rivers*, 917 F.2d 369, 373 (8th Cir. 1990) ("[w]hen the trial court is faced with sentence enhancement based upon hearsay evidence, we deem it advisable that the trial court exercise a more searching inquiry which may or may not serve to provide sufficient corroborating evidence to support the government's claim.").

CONCLUSION

Neither the Confrontation Clause nor due process requirements precluded the sentencing court from considering the Statement. The Confrontation Clause does not apply at sentencing to preclude a court from considering hearsay evidence. Due process requires that hearsay bear some minimal indicia of reliability in order to be considered at sentencing. Although the Statement was presumptively unreliable, the presumption of its unreliability was rebutted by extrinsic corroborating evidence, which the district court properly considered at the time of sentencing.

The sentences of DeWitt and Debraine are affirmed. The challenges to the sentences of Petty and Quintal, on the grounds set forth in this opinion, are rejected. However, pursuant to our separate opinion filed herewith, the sentences of Petty and Quintal are remanded to the district court for reconsideration.

Sentences of DeWitt and Debraine AFFIRMED. Sentences of Petty and Quintal REMANDED.

NOONAN, Circuit Judge, dissenting:

With admirable desire for harmony with other circuits and with an understandable unwillingness to challenge the conventional wisdom suggested by their decisions, the court has declined to recognize that the United States Constitution has been violated by the sentencing in this case. Harmony and deference to convention are important, but not so important as the fundamental principles of our government. Fundamental principles call for a different result.

The Confrontation Clause

The Sixth Amendment, part of our Bill of Rights, declares: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ." An initial question is whether sentencing is part of a criminal prosecution. It has been held that the Sixth Amendment right to jury trial does not apply at sentencing, but that conclusion was reached by taking into account the historic exclusion of juries from the sentencing process. *Spaziano v. Florida*, 468 U.S. 447, 459 (1984). In contrast, the Sixth Amendment right to counsel at a sentencing hearing has been established. *Mempa v. Rhay*, 389 U.S. 128, 134-35 (1967). The recognition of this right involved the acknowledgment that sentencing is one of "the various stages in a criminal proceeding." *Id.* at 134.

If sentencing is part of a criminal proceeding in determining the right to counsel, it follows that sentencing is also a criminal prosecution in determining the right to confront witnesses. This conclusion is the stronger because "the right to the assistance of counsel has been understood to mean that there can be no restrictions upon the function of counsel in defending a criminal prosecution in accord with the traditions of the adversary factfinding process . . . ." *Herring v. New York*, 422 U.S. 853, 857 (1975). What is the point of having counsel if counsel cannot exercise an essential function of

counsel — the cross-examination of the witnesses against counsel's client?

The majority rightly observes that no decision of the United States Supreme Court requires that the Confrontation Clause be applied in sentencing. The court wrongly concludes that it should not be applied in the present case. The wrong conclusion is reached by ignoring two fundamental facts of contemporary criminal law in the federal courts.

First. The normal outcome of a federal criminal prosecution is a plea of guilty. In 318,737 federal investigations in the period 1987-1989, there were 165,757 indictments, and there were 116,619 guilty pleas. Eighty-six percent of criminal prosecutions resolved from 1987 through 1989 were terminated without trial. U.S. Sentencing Commission, The Federal Sentencing Guidelines: A Report on the Operations of the Guidelines Sys. and Short-Term Impacts on Disparity in Sentencing, Use of Incarceration, and Prosecutorial Discretion and Plea Bargaining 69 (Dec. 1991). In all of these instances the only significant event in the criminal prosecution was the sentencing. To deny that the sentencing process is part of a criminal prosecution is to cut out the guts of criminal prosecution as it is conducted in our courts. By the same stroke the Sixth Amendment is struck and crippled.

In another context, it has been observed that there is a tendency for the courts to build Potemkin Villages — that is, attractive but illusory structures that suggest a healthy state of constitutional safeguards that do not actually exist. Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. Chi. L. Rev. 1109, 1110 (1990). To pretend that we are assuring the rights of the accused in "all criminal prosecutions," but to deny the confrontation right in eighty-six percent of such prosecutions, is to create a Potemkin Village. We pretend to solicitude for the accused's rights. We deny them in fact.

Second. The pretense is the more subversive because the facts accepted as established at the sentencing hearing determine the sentence, in some instances with mathematical exactitude. In drug cases, the quantity of drugs possessed or distributed mechanically sets the limits of the sentence that must be given. U.S.S.G.§ 2D1.1. In this respect, sentencing under the Sentencing Guidelines is wholly different from sentencing before 1987 where the district court had an almost unrestrained discretion to sentence within the broad limits set by the relevant criminal statute. *See* Stanley A. Weigel, *The Sentencing Reform Act of 1984: A Practical Appraisal*, 36 UCLAL.Rev. 83 (1988).

To fail to take account of the radical change effected by the Sentencing Guidelines, and to fail to see that most criminal prosecutions are, in fact, hearings on the sentence to be imposed is to overlook the major features of a criminal trial in our contemporary federal system.

The majority opinion makes the point that the Sentencing Guidelines themselves explicitly allow a sentencing court to consider information without regard to its admissibility and "there is no language in the Guidelines" requiring the application of the Confrontation Clause. To use the Sentencing Guidelines to interpret the Confrontation Clause is to let the tail wag the dog. The Sentencing Guidelines are the work of an ad hoc committee. The Constitution sets the structure of our system. The Guidelines must yield to the Constitution, not the Constitution to the Guidelines.

Traditionally the district courts have considered a wide range of information, and strict compliance with the Confrontation Clause would restrict this range. This observation stands as an objection to respecting the Confrontation Clause here. Two answers make the objection irrelevant. One is that the situation has changed with the Sentencing Guidelines. The other is that the Confrontation Clause has never been construed literally but, while remaining a vital principle, has

shown a certain elasticity in application. *See Idaho v. Wright*, 497 U.S. 805, ___, 110 S.Ct. 3139, 3145-46 (1990). If the Confrontation Clause applied to bar the kind of self-serving hearsay admitted in this case, it would not follow that every kind of hearsay must therefore be barred in sentencing.

Here is how Kessack himself later described his statement: He had been advised that he was facing a possible sentence in excess of 30 years and that "the only way" he could hope for a lesser sentence "was to cooperate with the government." He then "agreed to provide a statement to the government in the hope that I could convince the government to recommend a lesser sentence for me." The government lawyers

> told me that if I minimized my role, or the role of others, that I would be "worthless as a witness" and that they would have 'no interest in dealing with me'. They also told me that it didn't matter how many kilos I said were involved, since nothing I said could or would be used against me.
>
> . . .
>
> The government insisted that I could remember things, even when I knew that I couldn't.
>
> . . .
>
> I was especially confused about the amounts of drugs involved and the sources of the drugs. I can't really be sure of the total amounts involved and the sources of cocaine.

In this case, the hearsay was of a character that we have stamped as inherently untrustworthy. *United States v. Magana-Olvera*, 917 F.2d 401, 409 (9th Cir. 1990). It was a statement, like the statements in that case, made by a defendant "under custody." *Id.* It was a statement, like the state-

ments in that case, made "in an attempt to curry favor from the federal authorities." *Id.* It was a statement, like the statements in that case, designed to produce a plea bargain. *Id.* It was a statement, unlike the statements in that case, disavowed by the man who made it. It was a statement not at all against Kessack's interest because by its terms it could not be used against him except to impeach him if he later testified. The kingpin, Kessack was in a position to save his own skin by implicating deeply almost any one of his minions that he chose to throw to the government. No one would care to put credence in such a man's accusations, proffered in conditions under which he stood to profit by giving the prosecution some easy guesses about the quantity of drugs in which he dealt.

The district court and the court on this appeal have attempted to save the credibility of the statement by finding it corroborated by evidence extrinsic to the statement itself and extrinsic to the circumstances in which the statement was made. The district court took account of testimony by witnesses and admissions by Kessack and other conspirators to reach the conclusion that the conspiracy involved at least 50 kilos of cocaine. To the extent that this evidence was probative of this quantity, it was unnecessary for the district court to rely on Kessack's statement; if all these other pieces of admissible evidence did, in fact, establish a quantity over 50 kilos, why refer to Kessack's statement at all? On the other hand, if only Kessack's statement established the specific quantity, these other pieces of evidence were not corroborative of the precise information gathered from his statement and the specific number derived from it remained as much of a guess, motivated by self-interest, as it did before the district court looked at the "corroborating" evidence.

Salvaging the statement by this kind of extrinsic evidence is in any event inconsistent with the application of the Confrontation Clause. For hearsay to be accepted there must be "particularized guarantees of trustworthiness," found by considering "the totality of the circumstances." *Idaho v. Wright*,

110 S.Ct. at 3148. But the totality of the circumstances "include only those that surround the making of the statement and that render the declarant particularly worthy of belief." *Id.* The circumstances surrounding the making of this statement make the declarant particularly worthy of unbelief. The rank violation of the Confrontation Clause should result in a remand for resentencing of the defendants affected by the unreliable hearsay.

The purpose of the Confrontation Clause is to present "a barrier against flagrant abuses, trials by anonymous accusers, and absentee witnesses." *California v. Green*, 399 U.S. 149, 179 (1970) (Harlan, J., concurring). This understanding of the Confrontation Clause has recently been repeated in the same breath in which a certain flexibility in its application was acknowledged. *Maryland v. Craig*, 497 U.S. 836, ___, 110 S.Ct. 3157, 3166 (1990). What Justice Harlan and the Court in *Craig* recognized as a type of "flagrant abuse" in the context of a trial occurs here — "testimony" by an absentee witness; not only by an absentee witness but an absentee witness who had motive to lie the first time and later claimed that he had been confused and unaware about the quantity of drugs and said he knew facts when he could not remember them! The right at stake here goes to the heart of criminal justice — the right not to lose one's liberty on the basis of unreliable accusation.

The Due Process Clause

Reliance is placed by the majority on *Williams v. New York*, 337 U.S. 241 (1949), where it was held not to be a violation of due process for a judge, choosing between a sentence of death and life imprisonment, to use a wide variety of out-of-court information. *Williams* reached this result, the Court said, because the Court was reluctant to "undermine modern penological procedural policies." *Id.* at 250. Those policies were to have the punishment fit the individual and not merely the crime, with the result that indeterminate sentences and the

use of parole were emphasized and rehabilitation of the defendant was a major goal. *Id.* at 247-249. In that more innocent world, probation workers were viewed as "trained" to aid offenders, *id.* 249, and their report was seen as impartial, not adversarial.

The case is substantially different under the Sentencing Guidelines with their focus on a uniform punishment for particular crimes, with the diminishing confidence in rehabilitation as a purpose of incarceration, and the subjection of probation reports to adversarial hearings. To rely on a decision made in a different world 40 years ago as the measure of due process is to ignore the realities of the present system. *See* Note, *An Argument for Confrontation Under the Federal Sentencing Guidelines*, 105 Harv. L. Rev. 1880, 1885 (1992).

The Due Process Clause requires that defendants not be sentenced based on "misinformation of constitutional magnitude". *United States v. Tucker*, 404 U.S. 443, 447 (1972); *see also Gardner v. Florida*, 430 U.S. 349, 358 (1977) (plurality) (due process applies during sentencing). It violates due process to be sentenced on the basis of materially false or unreliable information. *United States v. Messer*, 785 F.2d 832, 834 (9th Cir. 1986). Material information is "unreliable" if it "lacks 'some minimal indicium of reliability beyond mere allegation.' " *United States v. Ibarra*, 737 F.2d 825, 827 (9th Cir. 1984) (quoting *United States v. Baylin*, 696 F.2d 1030, 1040 (3rd Cir. 1982)); *United States v. Hull*, 792 F.2d 941, 942 (9th Cir. 1986).

Kessack's statement is unalloyed allegation. It is the sort of self-serving statement that desperate men make to save themselves from a lifetime of imprisonment. The Supreme Court has refused to deviate from "the time-honored teaching that a co-defendant's confession inculpating the accused is inherently unreliable". *Lee v. Illinois*, 476 U.S. 530, 546 (1986). A statement that is "inherently unreliable" cannot be rehabilitated.

The majority opinion concedes that the defendant has a due process right not to be sentenced on the basis of materially incorrect information. How does one determine if information is materially incorrect except by first examining the reliability of the person offering the information and the circumstances in which it was offered? It has been recognized that the denial of cross-examination calls into question "the ultimate 'integrity of the fact-finding process.' " *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973) (quoting *Berger v. California*, 393 U.S. 314, 315 (1969)). The observation is made in terms of the Confrontation Clause, but if the ultimate integrity of the fact-finding process has been undermined, due process itself has been denied. What our system puts forward as " 'an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal,' " *Chambers* 410 U.S. at 295 (quoting *Pointer v. Texas*, 380 U.S. 400, 405 (1965)), is equally an essential and fundamental requirement of fairness in a sentencing procedure where the sentence is determined by the facts accepted as true. It violates not only the Confrontation Clause but the principle of fair play which animates our entire system of criminal justice to let Kessack's self-serving statement determine his co-defendants' sentence.

I respectfully dissent.

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APPPENDIX B

FILED 5/26/93

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ROBERT M. PETTY, Defendant-Appellant.	No. 90-30291 DC CR-89-272-Z
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MELVIN L. DEWITT, Defendant-Appellant.	No. 90-30292 DC CR-89-272-Z
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. PASCAL DEBRAINE, Defendant-Appellant.	No. 90-30293 DC CR-89-272-Z
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JORDAN QUINTAL, Defendant-Appellant.	No. 90-30294 DC CR-89-272-Z

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. GARY GRANGER, Defendant-Appellant.	No. 90-30295 DC CR-89-272-Z **ORDER**

Before: HUG, NOONAN, and THOMPSON, Circuit Judges.

Regarding the Memorandum Disposition and the Opinion authored by Judge Noonan, the panel has voted unanimously to deny the petitions for rehearing and to reject the suggestions for rehearing en banc.

Regarding the Opinion authored by Judge Thompson, Judges Hug and Thompson have voted to deny the petitions for rehearing and to reject the suggestions for rehearing en banc. Judge Noonan would grant rehearing and accept the suggestion for rehearing en banc.

The full court has been advised of the suggestions for en banc rehearing, and no judge of the court has requested a vote on

the suggestions for rehearing en banc. Fed. R. App. P. 35(b). The Petitions for rehearing filed by Petty, DeWitt, Debraine, Quintal, and Granger are hereby DENIED, and the suggestions for a rehearing en banc are REJECTED.